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Civil and political rights, including the questions of independence of the judiciary, administration of justice, impunity

Note by the Secretary-General

The Secretary-General has the honour to transmit to the members of the General Assembly the report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, submitted in accordance with decision 1/102 of the Human Rights Council.

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Summary

This report identifies the issues that have been of greatest concern to the Special Rapporteur during the year and since the issuance, in early 2006, of his reports on activities undertaken during 2005, which were submitted to the Human Rights Council in September 2006. In this, his second report to the General Assembly, the Special Rapporteur lists the many international conferences he has attended, as well as meetings held with various governmental and non-governmental stakeholders, with the aim of planning future missions and following up past missions.

A significant achievement highlighted in the report is the adoption by the Human Rights Council at its first session, held in June 2006, of an International Convention for the Protection of All Persons from Enforced Disappearance, after many years of hard work by the diplomatic community and human-rights bodies. The General Assembly is invited to adopt this instrument at the sixty-first session, to pave the way for signature and ratification by States. The seriousness and worldwide extent of the repressive practice of enforced disappearance demand a robust response from the international community, which now has the opportunity to establish a binding and universal instrument to combat that scourge.

The Special Rapporteur also wishes to alert the General Assembly to the fact that the wide powers given to military courts in some countries have given rise to repeated violations of the right to a fair trial by a legally established, independent and impartial tribunal. In that connection, he analyses the judicial precedents and international standards which bodies defending human rights at the regional and universal levels have developed. He also evaluates national judicial systems which are noteworthy in this connection, major reforms under way and the negative human rights impact of frequent recourse to military justice. Lastly, he makes a number of recommendations on the subject. Especially important in this field are the draft principles governing the administration of justice through military tribunals, which were drawn up by Mr. Emmanuel Decaux, expert of the Sub-Commission on the Promotion and Protection of Human Rights, and are currently before the Human Rights Council for consideration prior to their submission to the General Assembly.

The report also sets out the main findings and recommendations of the study carried out with other United Nations experts regarding the situation of detainees at Guantánamo Bay, analyses their repercussions and assesses the latest developments.

Lastly, it examines the recent course of the trial of Saddam Hussein and his collaborators, and recent developments at the International Criminal Court, both of these issues were covered in his previous reports to the Human Rights Council and the General Assembly. Lastly, the report embarks on an analysis of the activities of the Extraordinary Chambers in Cambodia.

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I. Introduction

1. This is the second report of the Special Rapporteur on the independence of judges and lawyers to the General Assembly. It describes his most recent activities and addresses two very topical issues: the International Convention for the Protection of All Persons from Enforced Disappearance, whose adoption by the General Assembly is recommended, and the need to limit the application of military justice solely to military personnel and to offences of a military nature. Lastly, it reviews developments in the trial of Saddam Hussein and his collaborators, at the International Criminal Court and in the Extraordinary Chambers in Cambodia in the light of the most recent available information. It also reviews, in like manner, the situation of the Guantánamo Bay detainees.

II. Activities of the Special Rapporteur

A. Activities to date

2. From 19 to 23 June 2006, in Geneva, the Special Rapporteur participated in the thirteenth annual meeting of mandate holders of the special procedures established by the Commission on Human Rights and extended by the Human Rights Council. As the report of the meeting[1] indicates, the participants took note of the activities of the Coordination Committee established at the preceding annual meeting. They discussed working methods, follow-up and implementation of recommendations, possible revisions of the Manual of the United Nations Human Rights Special Procedures and the challenges of making ongoing contributions to the work of the new Human Rights Council. In addition, the Special Rapporteur held discussions with the chairpersons of the various bodies established pursuant to international human rights treaties, as part of a meeting aimed at strengthening relations between those bodies and the special procedures.

3. During his stay in Geneva, the Special Rapporteur met with the Minister for Foreign Affairs of the Republic of Maldives, Mr. Ahmed Shaheed, who repeated his Government's invitation to the Special Rapporteur to undertake a mission to that country. Later, the Special Rapporteur held consultations with officials of the Office of the United Nations High Commissioner for Human Rights (OHCHR) in order to prepare for the mission, which will take place in October 2006. He also consulted with OHCHR officials in Geneva and in the Kingdom of Cambodia with a view to starting preparations for a potential mission to that country in November 2006. The Special Rapporteur also met with a representative of the Permanent Mission of Kenya with a view to undertaking a mission there at the beginning of 2007 in response to an invitation from the Kenyan Government. He also met with other ministers and representatives of various permanent missions to the United Nations in Geneva and with representatives of governmental and non-governmental organizations.

4. The Special Rapporteur attended the 17th international course on judicial independence, human rights and the Inter-American Democratic Charter, organized by the Andean Commission of Jurists and the Spanish Agency for International

[1] The unedited version of the report is available at http://www.ohchr.org/english/bodies/chr/special/docs/13threport.AEV.pdf.

Cooperation in Cartagena, Colombia, from 31 July to 4 August 2006. In his address, he described judicial independence as a guarantee of the judicial function.

B. Future activities

5. The Special Rapporteur plans to undertake the two missions referred to above, namely one to the Republic of Maldives in October 2006 and one to the Kingdom of Cambodia as a follow-up to the High Commissioner's visit. In the case of Cambodia, the Special Rapporteur hopes to receive an early reply from the Government so that this important mission can go forward as soon as possible. With regard to the Republic of Kenya, the Special Rapporteur has expressed his desire to carry out a mission in February 2007, but is awaiting an answer from the Government. He is also planning a mission to Ecuador to follow up on the recommendations made in his previous reports.

6. The Special Rapporteur will attend the second session of the Human Rights Council, to be held in Geneva from 18 September to 6 October 2006, and will present his annual report describing the main activities carried out in 2005 and early 2006, as well as the annexes thereto and the joint report on the situation of detainees at Guantánamo Bay. On 27 and 28 September, in Geneva, he will take part in the annual Inter-Parliamentary Union seminar, entitled "Law and justice: the case for parliamentary scrutiny". Lastly, he plans to take part in an international conference on judicial independence, to be organized by the International Association of Judges in Lomé from 12 to 15 November 2006.

III. International Convention for the Protection of All Persons from Enforced Disappearance

7. On 29 June 2006, the Human Rights Council adopted, by consensus, the International Convention for the Protection of All Persons from Enforced Disappearance, the text of which appears in the annex to its resolution 1/1, and recommended that the General Assembly should also adopt it. The text submitted for the Assembly's consideration is the result of many years of intense diplomatic activity and the product of a lengthy effort by human rights organizations, and more particularly the families of victims, to build a binding, universal instrument to combat such practices.

The roots of the Convention

8. In 1980, a Working Group on Enforced or Involuntary Disappearances was set up under the auspices of the Commission on Human Rights. It was the first thematic mechanism for addressing specific human-rights violations of a particularly serious nature, regardless of where they were committed.[2]

[2] As far back as the 1981 Paris Colloquium, there were calls for the enforced disappearance of individuals to be designated as a separate crime; then, in 1982, the Latin American Federation of Associations of Relatives of Disappeared Detainees (FEDEFAM) drew up the first preliminary draft declaration.

9. In 1992, the General Assembly adopted the Declaration on the Protection of All Persons from Enforced Disappearance as a body of principles to be applied by all States.

10. The Special Rapporteur, while serving as an expert of the Sub-Commission on Prevention of Discrimination and Protection of Minorities and Special Rapporteur on the question of human rights and states of emergency, recommended in his annual report[3] that a binding text should be drawn up to protect all individuals from enforced disappearance. In addition to having an effect on the impunity of those responsible for such crimes, such an instrument would have a *persuasive* and *preventive* effect, as repressive Governments would know in advance that no amnesty laws could be enacted.

11. In a regional context, the General Assembly of the Organization of American States (OAS) adopted, in 1994, the Inter-American Convention on Forced Disappearance of Persons.

12. In 1998 the Sub-Commission on the Promotion and Protection of Human Rights adopted the draft convention submitted by the independent expert Louis Joinet.

13. A decisive step was the decision taken in 2001 by the Commission on Human Rights (then chaired by this Special Rapporteur), at its fifty-seventh session, to establish an inter-sessional open-ended working group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance.

Value and content of the Convention

14. The recently adopted Convention is the first binding universal international instrument which recognizes the individual's right not to be a victim of enforced disappearance. It confirms that the widespread or systematic practice of enforced disappearance constitutes a crime against humanity and is therefore imprescriptible. It considers enforced disappearance to be a continuing offence and does not regard it as political for the purposes of extradition. It reaffirms the right of victims to justice and reparation, while establishing the right to know the truth about these violations. The Convention obliges States to ensure that these practices constitute a separate offence under their criminal law and to adopt measures to prevent, investigate, prosecute and penalize such offences, and confirms that national security or privacy considerations cannot be invoked to limit the protection of citizens against such violations. Moreover, it extends the concept of victim to any natural person having suffered harm as a direct result of an enforced disappearance. It guarantees to any person with a legitimate interest the right to know the truth regarding the perpetrators and circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person, and establishes the obligation to set up an effective procedure for obtaining this information. It stipulates that a Committee shall be established, to which the family members, relatives and legal representatives and any other person with a legitimate interest may appeal.[4] It also establishes that superiors are responsible for their subordinates' actions in certain circumstances, reaffirms the principles of extradition

[3] E/CN.4/Sub.2/1997/19.

[4] E/CN.4/2005/WG.22/WP.1/Rev.4, E/CN.4/2006/52.

in respect of those responsible, and requires States to establish criminal penalties for the removal of children who are born in captivity or who have disappeared together with their parents, while requiring that such children be returned to their families of origin.

15. Another significant element of the Convention is that it empowers its monitoring body to take urgent measures to search for disappeared persons. This innovative mechanism, known as "international habeas corpus", fulfils a preventive and humanitarian function and constitutes one of the main powers of the Committee on Enforced Disappearances, which also has a mandate to urgently inform the General Assembly, through the Secretary-General, of situations where there are well-founded indications that this offence is being practised on a systematic and widespread basis in a State party. In this way, the Committee plays a preventive role in cases where enforced disappearances may constitute crimes against humanity.

16. The Convention enshrines the *right to the truth* as an independent right. In this way it reflects the development of jurisprudence in the various systems for the protection of human rights, as was clearly shown in the report submitted by the Special Rapporteur to the Human Rights Council in 2006 (E/CN.4/2006/52). A particular feature of the right to the truth, which is based on treaty and customary law, is that it is both an independent right and the means for the realization of other rights: to information, to identity, to mourning and, especially, the right to justice. Because of the significance of the matters in question and the fundamental nature of the rights affected — to life, to physical or moral integrity, to a fair trial, etc. — the right to the truth is inalienable, non-derogable and imprescriptible. Also, national and international jurisprudence identifies the right to the truth as an international norm of *jus cogens*. Because of the inexorable nature of the knowledge of the truth, it may be stated, from a historical perspective, that *truth*, *justice* and *reparation* are fundamental components of a democratic society and that, far from weakening such a society, they nourish and strengthen it.

17. The international community recognized and began to pay particular attention to the enforced disappearance of persons during the 1970s and the early 1980s, when there emerged dictatorial regimes which used this practice in an institutionalized, systematic and widespread manner, with the aim of eliminating all forms of opposition. Latin America was among the main regions in which this sinister tool of repression was utilized. However, this practice has now been documented in 90 countries, and the total number of individual cases reported to the Working Group since its establishment is 50,000, which confirms the enormous importance of this instrument.

IV. Military justice in the context of the trying of civilians and serious human rights violations

18. In recent years the Special Rapporteur has noted with concern that the extent of the jurisdiction of military tribunals continues to be a serious obstacle for many victims of human rights violations in their quest for justice. In a large number of countries, military tribunals continue to try members of the armed forces for serious human rights violations, or to try civilians, in clear violation of applicable international principles, and, in some instances, even in violation of their own national laws.

A. International standards applicable to military tribunals

19. Military jurisdiction is governed by the international obligations of States in regard to human rights and the administration of justice. Although few international instruments refer specifically to military jurisdiction, human rights standards and principles relating to the administration of justice apply fully to it. In fact, the principal international human rights texts, both universal and regional, agree on a series of basic principles that are also applicable to military tribunals, such as the principle of equality before the law, the right to be tried by a competent and regularly constituted court, the right to an effective remedy, the principle of legality and the right to a fair trial. For its part, international humanitarian law contains important provisions on the administration of justice.[5]

20. The trying of serious human rights violations by military tribunals is explicitly prohibited only in article IX of the Inter-American Convention on Forced Disappearance of Persons and article 16 of the Declaration on the Protection of All Persons from Enforced Disappearance. However, an important body of international jurisprudence has been developed on the basis of general human rights norms relating to the administration of justice. In particular, the interpretation of the right to a fair trial has provided a foundation for the limitations imposed on the trying of civilians by military tribunals.

21. In this context, special mention should be made of the significant amount of work carried out by the experts of the Sub-Commission on the Promotion and Protection of Human Rights. This includes, in particular, the work carried out by Louis Joinet and, subsequently, by Emmanuel Decaux, which culminated in the elaboration of draft principles governing the administration of justice through military tribunals (E/CN.4/2006/58), to be considered by the Human Rights Council[6] at its second session, in September/October 2006. These principles are the result of years of research and consultation among experts, jurists and military personnel from all over the world, as well as representatives of diplomatic missions and non-governmental organizations. They are based on the extensive jurisprudence developed by various United Nations bodies and establish clear rules regarding the issues of concern here.

22. Principle No. 5 establishes that "Military courts should, in principle, have no jurisdiction to try civilians. In all circumstances, the State shall ensure that civilians accused of a criminal offence of any nature are tried by civilian courts". Meanwhile, Principle No. 9 stipulates that "In all circumstances, the jurisdiction of military courts should be set aside in favour of the jurisdiction of the ordinary courts to conduct inquiries into serious human rights violations such as extrajudicial executions, enforced disappearances and torture, and to prosecute and try persons accused of such crimes".

23. These two principles are also reflected in the updated set of principles for the protection and promotion of human rights through action to combat impunity, drafted by Diane Orentlicher and recommended by the Commission on Human

[5] Common article 3 of the four Geneva Conventions, article 105 of the Third Convention as it relates to article 130, article 75 of the First Protocol Additional and article 6 of the Second Protocol Additional.

[6] See decisions 1/102 and 1/105 of the Human Rights Council.

Rights.[7] Principle 29 establishes that "The jurisdiction of military tribunals must be restricted solely to specifically military offences committed by military personnel, to the exclusion of human rights violations, which shall come under the jurisdiction of the ordinary domestic courts or, where appropriate, in the case of serious crimes under international law, of an international or internationalized criminal court".

24. These norms reflect the spirit and the letter of the Basic Principles on the Independence of the Judiciary, principle 5 of which states that "Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals". They also reflect the conclusions already reached in recent decades by various international and regional bodies for the protection of human rights. In its general comment No. 13 (1984) on the right to a fair trial, the Human Rights Committee established that the trying of civilians by military courts should be of an exceptional nature, and recalled the duty of military courts to respect the guarantees stipulated in article 14 of the Covenant.[8] Its position has since evolved, and the Committee has stated on repeated occasions that military tribunals should not have jurisdiction to try civilians. For example, in its concluding observations on the second periodic report of Lebanon, in 1997, the Committee recommended that the Lebanese State "should review the jurisdiction of the military courts and transfer the competence of military courts, in all trials concerning civilians and in all cases concerning the violation of human rights by members of the military, to the ordinary courts".[9] More recently, the Committee concluded that "the jurisdiction of military courts over civilians is not consistent with the fair, impartial and independent administration of justice".[10] Also, the Commission on Human Rights adopted a number of resolutions calling for military jurisdiction to be restricted to offences committed by military personnel. For example, in resolution 2005/30 of 19 April 2005, on the integrity of the judicial system, the Commission called upon "States that have military courts or special criminal tribunals for trying criminal offenders to ensure that such courts are an integral part of the general judicial system and that such courts apply due process procedures that are recognized according to international law as guarantees of a fair trial, including the right to appeal a conviction and a sentence".[11]

25. Other United Nations committees have expressed the same opinion, notably the Committee against Torture and the Committee on the Rights of the Child.[12] At its forty-second session, held in June 2006, the Committee on the Rights of the Child reiterated its position in its concluding observations on Colombia, noting "with concern the unbroken pattern of impunity and the continuous tendency to

[7] See Commission resolution 2005/81 of 21 April 2005.

[8] See HRI/GEN/1/Rev.7, chap. II, pp. 135 ff., para. 4.

[9] See *Official Records of the General Assembly, Fifty-second Session, Supplement No. 40* (A/52/40), chap. V, para. 344. For an overview of the jurisprudence of the Human Rights Committee on this subject, see Federico Andreu-Guzmán, *Military jurisdiction and international law: military courts and gross human rights violations*, Colombian Commission of Jurists; International Commission of Jurists, April 2003, pp. 55-62.

[10] See *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 40* (A/56/40), chap. IV, para. 76 (12).

[11] See *Official Records of the Economic and Social Council, 2005, Supplement No. 3* (E/2005/23-E/CN.4/2005/135), chap. II.

[12] Andreu-Guzmán, op. cit. (see note 9 above), pp. 62-65.

refer serious violations of human rights to the military justice system".[13] Various special procedures have expressed the same opinion. The Special Rapporteur himself has expressed his opposition to the jurisdiction of military courts to try civilians (in his first report to the Commission on Human Rights)[14] and to the establishment of military commissions with this same jurisdiction (in the joint report on the situation of detainees at Guantánamo Bay).[15] In his 2006 report to the Human Rights Council, the Special Rapporteur on extrajudicial, summary or arbitrary executions stated, "As an empirical matter, subjecting allegations of human rights abuse to military jurisdiction often leads to impunity".[16] Also, the Working Group on Arbitrary Detention took a very clear position against the trying of civilians by military tribunals, stating that "Concerning recourse to military tribunals and special courts, bringing suspected terrorists before special courts is regular practice" and warning that "one of the most serious causes of arbitrary detention is precisely the existence of such courts, virtually none of which respects the guarantees of the right to a fair trial".[17]

26. Both the Commission and the Inter-American Court of Human Rights have held that the trying of civilians by military tribunals conflicts with the articles of the American Convention on Human Rights, which guarantee the right to be tried by an independent and impartial court and the right to a fair trial. These bodies have developed the principle of functionality, which, in the view of the Special Rapporteur, is fundamental for defining the scope of military jurisdiction. This principle limits military jurisdiction to offences committed in relation to the military function, thereby limiting it to military offences committed by members of the armed forces. Thus, since military functions do not include the commission of gross human rights violations, and since civilians cannot commit offences of a military nature, gross human rights violations and offences committed by civilians must automatically be transferred to ordinary criminal courts.

27. In its recent judgement in the case of *Palamara Iribarne v. Chile*, of 22 November 2005, the Court reiterated that "In a democratic constitutional State, military jurisdiction in criminal matters must be limited and exceptional and must be aimed at protecting special legal interests relating to the functions assigned to the military forces by law. It should therefore try military personnel only for committing crimes or offences which, by their very nature, are damaging to juridical goods of the military system", and declared that civilians should be tried by the ordinary courts.[18] It concluded: "A State must, within a reasonable time period, adapt its domestic legal system to international standards on military jurisdiction in criminal matters so that if the existence of such jurisdiction is considered necessary, it will be limited solely to offences relating to the military function committed by military personnel in active service. The State must therefore establish, through its legislation, limitations on the material and personal jurisdiction of military courts, so that under no circumstances can a civilian be subject to the jurisdiction of military criminal courts".[19] This means that trying either civilians or military

[13] CRC/C/COL/CO/3, para. 44.
[14] E/CN.4/2004/60, para. 60.
[15] E/CN.4/2006/120.
[16] E/CN.4/2006/53, para. 37.
[17] E/CN.4/2004/3, para. 67.
[18] Paras. 124 and 139.
[19] Para. 269 (14).

personnel in military courts for human rights violations is incompatible with the obligations of States to guarantee to all individuals a fair trial before an independent court, to combat impunity and to guarantee the right of victims to an effective remedy and to reparation.

28. The European Court of Human Rights has not developed a very extensive body of jurisprudence regarding military justice. However, it has reiterated, in various decisions on Turkey's National Security Courts, that a civilian can legitimately allege violation of the European Convention for the Protection of Human Rights and Fundamental Freedoms on the grounds that such a court lacks independence if one or more of the court's judges are members of the armed forces, who are subject to military discipline and whose appointment is controlled by the executive branch.[20]

29. Likewise, on the basis of the aforementioned principle of functionality, the African Commission on Human and Peoples' Rights has repeatedly criticized the practice of using military courts to try civilians.[21] Thus, the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, adopted in 2003, not only expressly prohibit the use of military courts to try civilians; they also stipulate that all civilians have a right not to be tried by such courts.

B. Examples of national standards and practices

30. Below are a number of examples from different regions which illustrate the need to pursue efforts to bring national legislation into line with the international standards governing the administration of military justice.

1. Latin America

31. In the past, the defining characteristic of this region was the systematic use of coups d'état and military jurisdiction. While significant reforms imposing considerable restrictions on the application of military justice have been set in motion in many Latin American countries, such as the Bolivarian Republic of Venezuela and Argentina, the problem still looms large in the region.

32. With regard to the Bolivarian Republic of Venezuela, in a judgement handed down on 5 July 2006 by the Inter-American Court of Human Rights in the case concerning *Montero Aranguren et al. (Catia detention centre) v. Bolivarian Republic of Venezuela*, para. 45, the Venezuelan Government notified the Court that military courts were no longer competent to try cases involving serious human rights violations committed by military personnel, and pointed out that "it is true that, at the time of the events, the law allowed specialized courts such as military courts to try cases involving human rights violations. However, at present, following the entry into force in 1999 of the Constitution of the Bolivarian Republic of Venezuela and in accordance with article 25 thereof, such cases are heard only by ordinary

[20] Judgment of 9 June 1998, *Incal v. Turkey* (No. 41/1997/825/1031). See the Judgment of 28 October 1998, *Ciraklar v. Turkey* (No. 70/1997/854/1061); Judgment of 8 July 1999, *Gerger v. Turkey* (No. 24919/94); and Judgment of 8 July 1999, *Karatas v. Turkey* (No. 23168/94).

[21] See, inter alia, decision of 7 May 2001, communication No. 218/98 (Nigeria); decision of 6 November 2000, communication No. 223/98 (Sierra Leone); decision of April 1997, communication No. 39/90 (Cameroon); and decision of 1995, communication No. 60/91 (Nigeria).

courts, since that article provides that human rights violations and crimes against humanity must be investigated and tried by ordinary courts, thereby making it impossible to try such offences before specialized courts and demonstrating that consideration has been given to the legislative amendment requested by the Inter-American Commission on Human Rights". While the reform of the justice system was enshrined in articles 25, 2º and 261 of the National Constitution, the necessary reforms of the military criminal justice system have not yet been implemented and the 1998 Code of Military Justice remains in force. However, in an obiter dictum to a ruling issued in 2002, the Plenary Chamber of the Supreme Court of Justice took the view that "charges brought before military courts, insofar as they may not fall within the scope of the constitutional and legal provisions governing the proceedings of such courts, are liable to be contested by the parties concerned, in accordance with the relevant remedies and actions provided for by the legal order" [22].

33. Similarly, in Argentina, the Government is developing a comprehensive reform of the Code of Military Justice, which has been in force since 1951. The new proposal provides for the repeal of the current Code and the abolition of military jurisdiction in criminal matters except in special cases occurring in "wartime or during other armed conflicts". In all other cases, the ordinary courts are competent to hear cases involving offences committed by military personnel. The reform proposal places due emphasis on the State's obligation to ensure that serious human rights violations committed by members of the armed forces are investigated and prosecuted by ordinary courts, with no legal or regulatory restrictions pertaining to the military status of the perpetrators. Furthermore, the reform incorporates the principle of the integrity of the judicial system, as promoted by the United Nations, since the repeal of the current Code of Military Justice does not entail the adoption of a new code but rather the incorporation into the national Penal Code of specific provisions dealing with military offences. It also provides for the abolition of the death penalty. This groundbreaking decision will pave the way for the Argentine Government's ratification of additional protocols on the abolition of the death penalty, including those adopted by Inter-American institutions and the Second Optional Protocol to the International Covenant on Civil and Political Rights.

34. In Guatemala, article 219 of the Political Constitution provides as follows: "Military courts shall hear cases concerning offences and misdemeanours committed by members of the Guatemalan army. Civilians shall not be tried by military courts". Similarly, article 12 stipulates that "[n]o one may be tried by special or secret courts". In 1996, the Congress of the Republic issued Decree No. 41-96, which provides that offences committed by military personnel under ordinary law must be tried by ordinary courts; accordingly, the military justice system remains in force only to rule on strictly military offences. However, the legislature is currently considering a draft law providing for the establishment of *in personam* jurisdiction, whereby military courts would be competent to try all offences committed by military personnel, even those involving human rights violations. The Special Rapporteur is extremely concerned about this draft law, which represents a huge step backwards and clearly contravenes international and regional jurisprudence.

35. In Colombia, the Political Constitution (of 1991) expressly prohibits, even during periods of domestic unrest, the investigation and trial of civilians by military

[22] Judgement of 2002, reporting judge Rafael Perez Perdomo, file No. 2002-00019.

criminal courts.[23] The Military Penal Code,[24] in force since August 2000, expressly excludes a number of gross human rights violations, such as torture, genocide and enforced disappearance (article 3), from the scope of competence of military courts. Since 1995, the Constitutional Court has ruled on the extent of the competence of military criminal courts and has restricted that competence to offences committed while carrying out activities directly linked to an inherent function of the armed forces, pointing out that the ordinary courts always have competence when the perpetrator had criminal intent from the outset or in cases of crimes against humanity.[25] However, according to the most recent report of the United Nations High Commissioner for Human Rights on Colombia, prosecutors do, in some cases, refer trials that should fall within their jurisdiction to military courts or fail to claim jurisdiction. In particular, cases involving the extrajudicial execution of peasants and indigenous persons by members of the armed forces, in which those deaths were portrayed as casualties of war, have been heard by military courts, in clear violation of the judgement issued by the Constitutional Court and of international standards.

36. As pointed out in paragraph 14 of the operative part of the judgement issued by the Inter-American Court of Human Rights, Chile has been urged to bring its domestic legislation on military criminal jurisdiction into line with the relevant international standards, since the scope of that jurisdiction, which covers human rights violations committed by military personnel and even police officers, as well as the trial of civilians, is regarded as excessively broad.[26]

2. Africa

37. In the Democratic Republic of the Congo, military jurisdiction, which is excessively broad, applies the principle of *in personam* jurisdiction: all offences committed by military personnel and police officers fall within the competence of military courts, including the most serious violations of human rights such as crimes against humanity. Police officers should never be subject to military jurisdiction, since they are members of the law enforcement authorities and are engaged in civilian, not military, activities. The principle of *in personam* jurisdiction, incorporated into article 156 of the new national Constitution adopted in May 2006, contravenes international norms and standards and, at the same time, engenders serious impunity because military courts lack independence, as they are subject to considerable pressure from the military hierarchy.[27]

38. Another issue of great concern is the fact that civilians are routinely tried by military courts for crimes that are not connected to military matters but have allegedly been committed with "weapons of war". Owing to the prevailing climate of violence in the country and to the scope of military jurisdiction, most crimes are currently investigated by military courts. In many cases, such courts try civilians in proceedings which are largely politically motivated. Accordingly, the ordinary

[23] Article 214 of the Political Constitution of 1991.
[24] Law No. 522 of 1999.
[25] Judgement C-358 of 5 August 1997, Constitutional Court of Colombia.
[26] Judgement of 22 November 2005, *Palamara Iribarne v. Chile*, para. 269 (14).
[27] For specific examples of impunity within the Congolese military justice system, see the report of the United Nations Organization Mission in the Democratic Republic of the Congo entitled "The Human Rights Situation in the Democratic Republic of the Congo (DRC) during the period of January to June 2006", 27 July 2006.

courts are becoming marginalized.[28] The Special Rapporteur expresses his deep concern about this phenomenon and calls on the new Congolese Parliament to take urgent action to restrict the competence of military courts, in accordance with international principles concerning military jurisdiction.

39. The military justice system in the Central African Republic also has far-reaching competence, since it covers all crimes and offences committed by military personnel in the performance of their duties and all crimes and offences committed by such personnel in military establishments, ships or aircraft. Furthermore, the definition of "military personnel" is very broad and also includes individuals who are not employed by the armed forces. At its eighty-seventh session, held in July 2006, the Human Rights Committee reiterated its concern about the competence of military courts to hear cases involving torture and extrajudicial executions committed by military personnel in the Central African Republic.[29]

3. Arab States

40. The scope of military jurisdiction is also frequently excessive in a number of Arab States. In Egypt, under the law on counter-terrorism, military courts are competent to try civilians accused of terrorism. The Human Rights Committee has severely criticized that state of affairs, noting also that military courts do not offer guarantees as to their independence and that their decisions are not subject to appeal before a higher court.[30]

41. In Tunisia, counter-terrorism legislation also empowers military courts to investigate and try civilians suspected of terrorist activities and establishes that the decisions of those courts are not subject to appeal. This legislation has been singled out for its flagrant violation of the right of every individual to be tried by a competent, independent and impartial tribunal, with all the guarantees of a fair trial, including the fundamental right to have a decision reviewed by a higher tribunal.

42. In Jordan, the State security courts established in 1991 are competent to try military personnel and civilians, in accordance with a very broad definition of offences classified as crimes against State security. These courts are considered military courts because they are composed of two military judges and one civilian judge. Furthermore, it has been alleged that they are not independent, since their judges are appointed directly by the Prime Minister. While appeals against their decisions may be brought before the Court of Cassation, the latter has sentenced a number of civilians to death and ordered their execution. The Committee against Torture has urged the Jordanian authorities to abolish the State security courts and allow the ordinary judiciary to recover full criminal jurisdiction in the country.[31]

4. Asia and the Pacific

43. Under Cambodian law, military courts have competence only in respect of military offences committed by military personnel. However, in a number of cases civilians have been tried by military courts, in contravention of international

[28] Ibid.
[29] CCPR/C/CAF/CO/2, para. 12.
[30] CCPR/CO/76/EGY, para. 16 (b).
[31] *Official Records of the General Assembly, Fiftieth Session, Supplement No. 44* (A/50/44), paras. 159-182, in particular para. 175.

standards and the country's own domestic legislation.[32] It is alleged that conflicts between the two jurisdictions have led to almost total impunity for military personnel who have committed criminal offences. In this connection, the Special Representative of the Secretary-General for human rights in Cambodia indicates, with reference to a series of summary executions committed by military personnel, that no cases have been investigated because, while the Public Prosecution branch has claimed jurisdiction, it cannot take action without the permission of the executive branch, and the Military Prosecutor has also claimed jurisdiction but has not initiated investigations.[33]

44. In Nepal, Parliament is currently considering a proposed law on the reform of the army which also deals with military justice. The draft law, like the law currently in force, allows military courts to exercise jurisdiction in respect of gross human rights violations, such as extrajudicial executions, enforced disappearances and torture, committed by members of the army. It also stipulates that military personnel have immunity for any acts committed in the performance of their duties, even when such acts result in the death of an individual. Moreover, the draft law empowers the army to decide whether, where an offence falls within the competence of both jurisdictions, a case should be heard by the ordinary or the military courts. These provisions run counter to the relevant international standards. The Special Rapporteur urges the Nepalese legislature to adopt the amendments necessary to ensure that the draft law is in line with applicable international standards and that it guarantees that military personnel responsible for gross human rights violations are tried by ordinary courts and that conflicts of jurisdiction are resolved by a higher judicial body that forms part of the system of ordinary courts, in accordance with the draft principles governing the administration of justice through military tribunals (No. 17).

5. Central Asia, Europe and North America

45. During his visit to Tajikistan, the Special Rapporteur found that military justice plays an overly important role within the judicial system. Military courts give rulings in criminal and civil cases. They are competent to rule in civil cases provided that one of the parties is a member of the military and in criminal cases provided that at least one of the crimes (in cases where several crimes have been committed) or one of the accused (in cases where there are several accused) falls within the jurisdiction of military courts. Accordingly, military courts try civilians in both criminal and civil cases whenever a member of the military is involved, regardless of whether the case relates to simple civil liability or gross human rights violations. That legislation contravenes international standards on access to an impartial and independent tribunal and the right to an effective remedy in the case of human rights violations. In his report, the Special Rapporteur recommended the adoption of reforms to ensure that military courts had jurisdiction only over cases relating to crimes of a strictly military nature and that they did not have competence in cases in which one of the parties was a civilian.

[32] The case of Cheam Channy and other examples of civilians tried by military courts appear in the October 2005 report (on continuing patterns of impunity in Cambodia) prepared by the former Special Representative of the Secretary-General for human rights in Cambodia.

[33] Ibid., p. 24.

46. The same situation can be observed in various other countries in the region. For instance, in the Russian Federation, military courts are competent to investigate all offences committed by members of the army, the armed forces of the Ministry of the Interior and the Spetsnaz forces. However, in most cases the Office of the Military Prosecutor does not investigate cases involving military personnel.

47. With regard to the United States of America, in the joint report on the situation of detainees at Guantánamo Bay (E/CN.4/2006/120), the Special Rapporteur expressed his concern about conditions of detention, as set out below.

V. The situation of detainees at Guantánamo Bay

48. The Chairperson-Rapporteur of the Working Group on Arbitrary Detention, Leila Zerrougui; the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy; the Special Rapporteur on torture, Manfred Nowak; the Special Rapporteur on freedom of religion, Asma Jahangir; and the Special Rapporteur on the right to health, Paul Hunt, have been following the situation of the detainees at Guantánamo Bay individually since January 2002 and jointly since June 2004. They submitted their final report to the Commission on Human Rights in February 2006 (E/CN.4/2006/120). As it was not possible to visit the detention centre, the report is based on data provided by the United States Government, interviews with former detainees and responses from lawyers acting on behalf of certain detainees to questionnaires submitted by the experts. It is also based on information available in the public domain, including reports prepared by non-governmental organizations, official United States documents and media reports.

49. The report points out that the situation of the detainees at Guantánamo Bay violates the International Covenant on Civil and Political Rights, to which the United States is a party, and that the detainees are entitled to challenge the legality of their detention before a judicial body in accordance with international human rights instruments, failing which they should be released. The report also states that the executive branch of the United States Government operates as judge, prosecutor and defence counsel of the detainees; this constitutes a clear violation of various guarantees of the right to a fair trial before an independent tribunal. With respect to the conditions of detention, the report condemns the interrogation techniques being used, particularly if they are applied simultaneously, since they amount to inhuman and degrading treatment as defined in the Convention against Torture and the International Covenant on Civil and Political Rights. The report confirms that detainees have been victims of violations of the right to health and to freedom of religion and points out that the force-feeding of detainees on hunger strike and the use of violence during the transfer of detainees constitute torture, as defined in the Convention.

50. In view of this assessment, the five experts request the United States Government to close the detention facilities at Guantánamo Bay without delay. Until the closure, the Government should refrain from interrogation techniques and other practices that amount to torture or inhuman or degrading treatment and should respect unconditionally the detainees' right to health and to religious freedom. They reaffirm the applicability of international human rights law and international humanitarian law and demand that the detainees be afforded the guarantees set forth therein. They recommend that the Government investigate all allegations of torture

or ill-treatment and that the perpetrators, including the highest level of military and political command who ordered or tolerated such practices, be brought to justice. They also recommend that all victims of torture or degrading and inhuman treatment receive adequate compensation and that detainees not be transferred to countries where they could be subjected to torture.

Subsequent developments

51. Immediately following the issuance of the report, the European Parliament expressed its views on the matter and essentially endorsed the experts' conclusions and recommendations. Numerous non-governmental organizations, senior officials of European Governments and the Secretary-General himself took the same position.

52. In May 2006, the United Nations Committee against Torture issued its report on the United States Government's compliance with the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and on the future of the Guantánamo Bay detention centre. The report urges the Government to "close this detention facility, permit access by the detainees to judicial process or release them as soon as possible, ensuring that they are not returned to any State where they could face a real risk of being tortured", and notes that detaining these persons indefinitely constitutes per se a violation of the Convention against Torture.

53. On 29 June 2006, the United States Supreme Court itself, in its ruling in *Hamdan v. Rumsfeld*, confirmed the key points of the experts' report. The Court held that the "structure and procedures" of the military commissions violated both the Uniform Code of Military Justice of the United States "and the ... Geneva Conventions". The decision invalidated the exclusion of any person from the application of the standards of law based on his or her classification as an "enemy combatant". It found that the executive branch and the commissions had failed to secure properly sworn and authenticated evidence and had instead confined their arguments to emphasizing the detainees' status as "enemy combatants" or "terrorists". According to the decision, this status does not constitute grounds. The decision established the unlawfulness of this vague charge and of a subsequent charge of conspiracy brought against the detainee one year later; neither domestic law nor the law of war recognizes conspiracy as an offence that can be tried before a military commission. The decision stated that the President of the United States may not, in the absence of congressional authorization, deviate from legally established procedures for the establishment and operation of military commissions, even in the case of detainees classified as "enemy combatants" by the executive branch. (In fact, Congress denied the executive branch the legislative authority to create military commissions of the kind at issue here.) The decision condemned the violation of the detainee's right to a defence and, in particular, the basic right to be present at his trial, as provided in the Manual for Courts-Martial and the Uniform Code of Military Justice. It is important to note that it endorsed the application of common article 3 of the four Geneva Conventions, which requires that detainees be tried "by a regularly constituted court affording all the judicial guarantees which ... are recognized as indispensable by civilized peoples". The report underlines the importance of common article 3, which, because of its content and scope, constitutes a sort of "mini-convention" that establishes the minimum legal and humanitarian conditions that must be met by all States.

54. The Supreme Court decision opened up the possibility of finding a legal solution to the enormous problem facing the United States, whose military commissions have not only prevented the release of innocent people but have also failed to convict those responsible.

55. After the decision was issued, the United States Senate took steps to develop a new kind of tribunal to try the terrorist suspects detained at Guantánamo Bay or, in the alternative, to legalize the current commissions in compliance with the Supreme Court decision. On 7 July 2006, the Department of Defense instructed its staff to bring their policies, practices and guidelines into line with the provisions of common article 3 of the Geneva Conventions. However, this order applied to detainees in the custody of the Department of Defense but not to the detainees allegedly being held by other Government entities such as the Central Intelligence Agency (CIA), and therefore only partially complied with the Supreme Court decision.

56. In July 2006, the Inter-American Commission on Human Rights adopted resolution 1/06, which urged the United States Government "to close the Guantánamo Bay facility without delay"; to remove the detainees "in full accordance with ... international human rights and humanitarian law"; to "investigate, prosecute and punish any instances of torture or other cruel, inhuman or degrading treatment or punishment that may have occurred"; and to take the measures necessary to ensure detainees "a fair and transparent process before a competent, independent and impartial decision-maker".[34]

57. The Special Rapporteur hopes that the recommendations of the five independent United Nations experts, the resolution of the Inter-American Commission on Human Rights and the ruling of the United States Supreme Court will be fully implemented so that the United States justice system can uphold its historical tradition of defending human rights.

VI. Supreme Iraqi Criminal Tribunal

58. As far back as 10 December 2003, the Special Rapporteur began expressing his reservations about the functioning of the Supreme Iraqi Criminal Tribunal and voicing his concern at the violation of international human rights principles and standards, in particular the right to be tried by an impartial and independent tribunal and the right to a defence. He has issued numerous press statements and has written several letters to the Government of Iraq in which he criticizes the deplorable conditions in which the trial of Saddam Hussein and his former aides is being conducted, and has expressed particular concern at how the ongoing violence and insecurity in the country has affected the proceedings. The violence is such that, since the beginning of the trial, one judge, five prospective judges, three of Saddam Hussein's defence lawyers and one Tribunal employee have been murdered and a third party has been seriously wounded. The Special Rapporteur will provide a detailed description of the follow-up in his next report to the Human Rights Council.

[34] Press release No. 27/06 of the Inter-American Commission on Human Rights.

VII. International Criminal Court

59. The Special Rapporteur has discussed the International Criminal Court in several of his reports because its establishment constitutes an important step forward in the fight against impunity and the protection of victims.

60. The Special Rapporteur points out that, between June 2005 and August 2006, the Governments of Mexico, the Comoros and Saint Kitts and Nevis ratified the Rome Statute of the International Criminal Court.

61. On 10 February 2006, Pre-Trial Chamber I of the International Criminal Court issued a warrant of arrest against Thomas Lubanga Dyilo of the Democratic Republic of the Congo, who is the leader and founder of the Union des patriotes congolais. He is alleged to have been involved in the commission of war crimes, namely enlisting and conscripting children under the age of 15 and using them to participate actively in hostilities. On 17 March 2006, Mr. Lubanga was arrested and surrendered to the Court, thanks to the cooperation of a number of States and international organizations. Finally, on 28 August, the Prosecutor of the Court brought charges against Mr. Lubanga. A hearing to confirm the charges is scheduled for 28 September 2006. If the charges are confirmed, this will be the first case to be heard by the Court, which, within 60 days, may (a) confirm the charges and proceed with the trial; (b) dismiss the charges; or (c) postpone the hearing to enable the Prosecutor to present more evidence.

62. The Special Rapporteur welcomes the International Criminal Court indictments as a fundamental step forward in bringing justice to the countless victims of the brutal conflicts in Ituri, Democratic Republic of the Congo. He also welcomes the investigations currently being conducted in Uganda and Darfur by the Prosecutor. The Darfur case was referred to the Court by the Security Council under the provisions of article 13 (b) of the Rome Statute.

VIII. Extraordinary Chambers in Cambodia

63. The Special Rapporteur is pleased that the Extraordinary Chambers in Cambodia have initiated the prosecution of the senior leaders of the Khmer Rouge for the heinous crimes committed between April 1975 and January 1979. On 3 July 2006, the Cambodian and international judges were finally sworn in. The Special Rapporteur urges the judges to conduct the trials in full compliance with international standards on the right to a fair, impartial and independent trial. He also expresses his concern at the delay in trying the alleged perpetrators, in view of their advanced age, and urges the authorities to move forward as quickly as possible in order to meet the demand for justice on the part of the survivors and Cambodian society.

IX. Conclusions and recommendations

Conclusions

64. **Recent experiences and the continued practice of enforced disappearance of persons in different parts of the world demonstrate the urgent need for an internationally binding instrument, universal in scope, to punish the**

perpetrators of these violations; obtain reparation for the victims; effectively curb impunity; and act to prevent and deter this practice.

65. In carrying out his mandate, the Special Rapporteur has noted numerous violations of the right to a defence and a fair trial as a result of the application of military jurisdiction. The report reveals that the broad jurisdiction granted to military tribunals in certain countries constitutes a serious obstacle to the enjoyment of human rights, in particular the right to be tried by a competent, independent and impartial tribunal.

Recommendations

66. The Special Rapporteur recommends that the General Assembly, at its sixty-first session, adopt the International Convention for the Protection of All Persons from Enforced Disappearance and open the Convention for signature, ratification and accession. He also recommends that all States sign and ratify this Convention without delay.

67. The Special Rapporteur invites the General Assembly to adopt the draft principles governing the administration of justice through military tribunals, once they are submitted for its consideration. These principles are essential for guaranteeing that the application of military justice is compatible with respect for human rights, particularly those rights that are exercised through the proper administration of justice.

68. The Special Rapporteur urges all States to bring their domestic legislation into line with international standards on military jurisdiction and to restrict such jurisdiction exclusively to crimes of a strictly military nature committed by military personnel in active service. In no case should military tribunals be competent to try civilians or to try military personnel who have committed serious violations of human rights, in accordance with the principle of functionality.

69. The Special Rapporteur urges States to respect the principle of the integrity of the judicial system and not to set up military or special commissions to try civilians suspected of terrorist or other criminal activities. In accordance with the precedents and jurisprudence outlined in this report, counter-terrorism cannot, under any circumstances, validly justify the violation of current international standards under which all persons have the right to be tried by a competent, independent and impartial tribunal.

70. The Special Rapporteur urges the United States Government to comply with the recommendations of the five independent United Nations experts, the resolution of the Inter-American Commission on Human Rights and the decision of the United States Supreme Court; to close the detention centre at Guantánamo Bay without delay; and to carry out all the measures requested in respect of the situation of the detainees.

71. As regards the trial of Saddam Hussein and his senior aides, the Special Rapporteur reiterates his previous recommendations, in particular that the trial be conducted in accordance with international standards or that an international criminal tribunal be constituted with the cooperation of the United Nations.

72. The Special Rapporteur recommends that the General Assembly adopt the United Nations Declaration on the Rights of Indigenous Peoples.